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No. 01-372

In the Supreme Court of the United States

JAMES T. HANNON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the determination of the Merit Systems Protection Board that petitioners are not "law enforcement officers" within the meaning of the civil service retirement statutes, 5 U.S.C. 8331(20), 8401(17).

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OPINIONS BELOW

The opinion of the court of appeals in *Hannon* v. *Department of Justice* (Pet. App. 1a-14a) is reported at 234 F.3d 674. The opinion of the Merit Systems Protection Board (MSPB or Board) (Pet. App. 18a-33a) is reported at 82 M.S.P.B. 315. The opinion of the administrative judge (Pet. App. 42a-73a) is unreported.

The opinion of the court of appeals in *Townsend* v. *Department of Justice* (Pet. App. 16a) is unreported. The opinion of the MSPB (Pet. App. 34a-41a) is reported at 83 M.S.P.B. 427. The opinion of the administrative judge (Pet. App. 42a-73a) is unreported.

JURISDICTION

The judgment of the court of appeals in *Hannon* was entered on December 7, 2000. The judgment of the

court of appeals in *Townsend* (Pet. App. 16a) was entered on January 11, 2001. Petitions for rehearing were denied in both cases on May 1, 2001 (Pet. App. 14a-15a, 17a). On July 20, 2001, Chief Justice Rehnquist granted petitioners' application to extend the time within which to file the petition for a writ of certiorari to and including August 29, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal employees who qualify as a "law enforcement officer" (LEO) under the Civil Service Retirement System (CSRS), 5 U.S.C. 8336(c)(1), or the Federal Employees Retirement System (FERS), 5 U.S.C. 8412(d), enjoy special retirement benefits. An LEO may retire upon attaining the age of 50 and completing 20 years of LEO service. 5 U.S.C. 8336(c)(1), 8412(d)(2). In contrast, most other civil service employees are not eligible to retire until they reach the age of 60 and have 20 years of service, or reach the age of 55 with 30 years of service. 5 U.S.C. 8336(a) and (b), 8412(a) and (b). An LEO also is entitled to a larger retirement annuity than other civil service employees (though an LEO is also subject to larger salary deductions during his federal employment), and may qualify for mandatory early retirement. 5 U.S.C. 8334(a) and (c), 8335(b), 8425; 5 C.F.R. 831.901, 831.907, 831.908.

An employee may qualify for LEO retirement credit in one of two ways: (1) by serving in a position that is formally designated as an LEO position; or (2), if the employee does not occupy such a position, by asking his employer to recognize that he nonetheless qualifies for LEO status. 5 C.F.R. 831.903-831.906, 842.803-842.804, 842.807(a). An employee who applies for LEO retire-

ment credit bears the burden of proving that he qualifies as an LEO under either the CSRS or the FERS. 5 C.F.R. 831.906(a), 1201.56(a)(2).

The CSRS defines an LEO as

> an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

5 U.S.C. 8331(20). The FERS defines an LEO as

> (A) an employee, the duties of whose position—
>
> (i) are primarily—
>
> (I) the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or
>
> (II) the protection of officials of the United States against threats to personal safety; and
>
> (ii) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency.

5 U.S.C. 8401(17).

The Office of Personnel Management (OPM) has promulgated regulations further explicating the foregoing definitions. 5 U.S.C. 8347(a), 8461(b). The regulations specify that an LEO "does *not* include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons *other than persons who are suspected or convicted of offenses against the criminal laws of the United States.*" 5 C.F.R. 831.902, 842.802 (emphasis added). The regulations further specify that the "rigorous" requirement of the FERS is met if the duties of a position "are so rigorous that employment opportunities should, as soon as reasonably possible, be limited * * * to young and physically vigorous individuals." 5 C.F.R. 842.802.

In addition, the MSPB—which adjudicates disputes over whether employees qualify for LEO retirement credit—has extrapolated from the statutes and regulations various factors that it has determined illuminate the inquiry whether an employee meets the definition of an LEO. As the Federal Circuit has explained:

> According to the Board, [an LEO] within the statutory contemplation commonly (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving *Miranda* warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness.

Bingaman v. *Department of Treasury*, 127 F.3d 1431, 1436 (Fed. Cir. 1997); see Pet. App. 7a-8a. The Board also "consistently has recognized * * * that hazard is a significant element of law enforcement work." *Id.* at

8a (citing MSPB decisions). No single factor is "essential or dispositive," but together the factors capture what the Board has determined is "the essence of what Congress intended." *Id.* at 8a, 12a.

2. Petitioners served as diversion investigators for the Drug Enforcement Administration (DEA) within the United States Department of Justice. See Pet. App. 2a, 35a-36a. The work of a DEA diversion investigator involves inspections and audits of manufacturers and distributors of controlled substances to ensure that the products have not been diverted from legitimate distribution channels to illegal ones. *Id.* at 2a. The work also involves determining compliance with recordkeeping procedures, security safeguards, and other requirements of the Controlled Substance Act, 21 U.S.C. 801 *et seq.* Pet. App. 2a. Diversion investigators also participate in criminal investigations; however, under agency policy, they cannot carry firearms, make arrests, execute search warrants, make undercover purchases, control confidential informants, or conduct moving surveillance. *Ibid.*

The position of a DEA diversion investigator is not formally designated as an LEO position, but petitioners separately applied to the Department of Justice for enhanced retirement credit on the ground that they qualified as LEOs under the CSRS and FERS. In May and June of 1995, the Department of Justice issued final decisions that petitioners were not entitled to LEO retirement credit. Petitioners appealed those agency decisions to the MSPB and the Board consolidated their appeals. Pet. App. 42a-43a.

In 1997, an administrative judge issued an initial decision reversing the agency's finding in both cases. Pet. App. 42a-73a. The agency then sought review of that ruling before the full MSPB. On June 15, 1999, the

MSPB reversed the initial decision of the administrative judge in *Hannon*. *Id.* at 18a-33a. After considering the factors summarized in *Bingaman* (discussed above), the Board concluded that Hannon's "primary duties as a Diversion Investigator did not constitute the 'frontline law enforcement work,' entailing unusual physical demands and hazards, that is required for primary LEO service credit." *Id.* at 32a. Moreover, as the Board explained, Hannon "did not carry a firearm, did not have the authority to make arrests or execute search warrants, was not on call 24 hours a day, and was not required to maintain a significant level of physical fitness." *Ibid.*

On August 31, 1999, the MSPB reversed the administrative judge's initial decision in *Townsend*. Pet. App. 34a-41a. As in *Hannon*, after considering the factors commonly present with respect to LEOs who meet the statutory definition, the Board concluded that Townsend's primary duties did not constitute the "frontline law enforcement work, entailing unusual physical demands and hazards," that is indicative of LEO status. *Id.* at 40a.

3. The Federal Circuit affirmed the MSPB's decision in *Hannon*. Pet. App. 1a-13a. The court of appeals explained that it "review[s] the Board's ultimate determination whether a particular employee is a law enforcement officer under 5 U.S.C. § 8331(20) under an arbitrary and capricious standard," and declined to overturn the Board's finding that Hannon does not qualify as an LEO. *Id.* at 13a. The court explained that "Hannon's work fell somewhere between activities that had been held to be [LEO] work and those that had been held not to be so," and that ultimately the determination whether Hannon qualifies as an LEO boiled down to a "judgment call[]" for the MSPB. *Id.* at 12a,

13a. The court also reviewed the Board's determination under the *Bingaman* factors and found that "[f]our of the six indicia of [LEO] status specified in *Bingaman* are not present here." *Id.* at 4a; see *id.* at 4a-5a, 12a-13a. The court declined to consider the argument—raised by Hannon for the first time in his reply brief—that the MSPB has improperly grafted new requirements on the statutory definition of an LEO, stating that that argument came "too late." *Id.* at 10a.

Shortly thereafter, the Federal Circuit summarily affirmed the MSPB's decision in *Townsend*. Pet App. 16a.

ARGUMENT

The court of appeals properly upheld the MSPB's determination that petitioners do not qualify for LEO status under the CSRS or FERS. That determination is supported by substantial evidence, as well as reasonable administrative interpretations of the civil service retirement statutes. The court of appeals' decisions in these cases do not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners' central contention (Pet. 7) is that the court of appeals has "strayed from the plain language of the statute" in determining an employee's eligibility for LEO retirement credit. In particular, petitioners object to the court of appeals' consideration of the factors developed by the MSPB, and discussed in *Bingaman*, to assist the Board in determining whether the statutory definition is met. That contention is without merit and was not properly raised by Hannon.

The purpose of the *Bingaman* factors in adjudicating claims to LEO status is to assist the finder of fact in determining when the statutory definition is met, and

not to displace that definition. The Board "has extrapolated [those factors] from the statutory and regulatory language, in light of the legislative history," and has determined that they "capture[] the essence of what Congress intended." *Bingaman*, 127 F.3d at 1436; see *Hobbs* v. *Office of Personnel Management*, 58 M.S.P.B. 628, 631 (1993) (discussing legislative history); *Ferrier* v. *Office of Personnel Management*, 66 M.S.P.B. 241, 248-249 (1995). In determining whether an employee qualifies as an LEO, the touchstone remains whether the statutory definition of an LEO is met. See Pet. App. 20a-21a.

The Board's decision to consider certain factors in deciding whether the statutory definition is met is particularly appropriate when, as here, the Board is faced with a difficult judgment call as to whether a particular position qualifies for LEO status. See Pet. App. 12a. It cannot plausibly be argued that DEA diversion investigators are *plainly* LEOs within the meaning of the CSRS or FERS. Congress has given the Board broad authority to adjudicate personnel disputes within its jurisdiction; the Board's legal rulings are reviewable under the arbitrary and capricious standard. *Id.* at 13a; see 5 U.S.C. 7703(c). That scheme leaves the Board discretion to decide when, or under what circumstances, the statutory definition is met, and if it chooses to do so, to develop general guidelines to that effect.

In any event, Hannon failed to present this argument below. This Court generally does not consider arguments that were not pressed or decided below. See *Lorillard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2420 (2001); *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334, 2341 (2001); see also *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not

decide in the first instance issues not decided below."). In this case, Hannon waited until his reply brief to raise the argument that the statutory definition of LEO precludes the consideration of additional factors in determining whether that definition is met. The court of appeals held that that argument was waived, and did not reach it in *Hannon*. Pet. App. 10a. Townsend timely raised the argument, but the court of appeals affirmed without an opinion. *Id.* at 16a. Accordingly, the Court is without the benefit of any court of appeals' decision discussing petitioners' principal contention in this Court. The absence of such a decision provides a sufficient basis to deny review.

2. Petitioners claim (Pet. 12) that the legislative history of the civil service retirement statutes provides "no support" for the decisions below. That is incorrect. The legislative history indicates that Congress intended LEO positions to be occupied by "young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." *Bingaman*, 127 F.3d at 1435 (quoting S. Rep. No. 948, 93d Cong., 2d Sess. 2 (1974)); see *Hobbs*, 58 M.S.P.B. at 631; Pet. App. 9a. At the same time, the interpretation urged by petitioners (Pet. 10)—that an employee may qualify as an LEO simply by demonstrating that he spends a majority of his time participating in criminal investigations, without regard to the nature of the activities performed in connection with those investigations—would extend LEO retirement benefits to a broad class of employees such as chemists, laboratory technicians, paralegals and secretaries in prosecutors' offices, and others who do not perform strenuous, frontline law enforcement duties. There is no evidence that Congress intended to include such employees

within the statutory definition of LEOs. Indeed, the FERS specifically provides that the duties of an LEO must be "sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals." 5 U.S.C. 8401(17)(A)(ii).

Petitioners suggest (Pet. 9) that the court of appeals erred in concluding that the MSPB did not abuse its discretion in considering the degree of hazard faced by petitioners as one of several factors in determining whether they met the statutory definition. The Board has recognized on multiple occasions that "the existence and degree of physical hazard is a factor to be considered in determining entitlement to LEO service credit." Pet. App. 22a (citing cases). And, as the Board has explained, consideration of that factor is supported by the legislative history of the civil service retirement statutes. *Id.* at 22a-23a. Moreover, the Board does not look to the degree of hazard posed by a position in isolation, but instead in conjunction with other factors. See *id.* at 23a ("Although * * * the existence or degree of hazards, in itself, may not be an appropriate factor to consider in determining an employee's LEO status, it is beyond cavil that the hazards inherent in frontline LEO duties, such as conducting criminal investigations, are precisely why physical stamina and vigor are necessary to overcome or minimize such hazards.").*

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* Petitioners rely (Pet. 9) on *Obremski* v. *Office of Personnel Management*, 699 F.2d 1263, 1272 n.31 (D.C. Cir. 1983), in challenging the Board's consideration of the hazard posed by a position. The footnote cited by petitioners relies upon a portion of a floor speech made by Congressman Daniels, who stated that enhanced retirement benefits included in the 1974 Amendments were not a "reward" for performing hazardous duties. 119 Cong. Rec. 30,596 (1973). Daniels' statement emphasizes that the *reason*

Petitioners also assert (Pet. 12-13) that the court of appeals "erred in refusing to defer to OPM's regulations implementing the statute at issue." That is incorrect. Neither the Board's nor the court of appeals' decision in this case is inconsistent with the regulations implementing the civil service retirement statutes. To the contrary, as discussed above, the regulations provide that, to meet the FERS' definition of LEO, an employee's duties must be "so rigorous" that they should "be limited * * * to young and physically vigorous individuals." 5 C.F.R. 842.802.

3. Petitioners' disagreement (Pet. 13-16) with the Federal Circuit's subsequent decision in *Watson* v. *Department of the Navy*, 262 F.3d 1292, 1299 (2001), is misplaced and, in any event, provides no reason to review the decisions below. In *Watson*, the Federal Circuit affirmed the decision of the MSPB to place more "emphasis on the purpose of the [employee]'s position," as opposed to simply the duties performed by an employee, in determining whether an employee qualifies for LEO status. *Id.* at 1297. The Board has determined that that approach is "more faithful to the language of the statutes and the regulations." *Ibid.*

Petitioners claim (Pet. 13) that in *Watson* the Federal Circuit "recognized the infirmity of the *Bingaman/Hannon* analysis." To the contrary. The *Watson* court recognized that the Board's position-oriented approach is "wholly consistent with the approach taken by this court in *Bingaman*," and that those factors may still be

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for providing early retirement to LEOs was not to reward them for hazardous duty, but rather to have them retire early because of the difficulty of performing hazardous duties as one ages. Daniels began his speech by stating that "the element of hazard was, and is, recognized." *Ibid.*

considered. 262 F.3d at 1301. In *Watson*, moreover, the MSPB itself emphasized that the Board's consideration of "the basic reasons for the existence of [a] position" would not preclude consideration "of what duties [an employee] performed from day-to-day in [that] position." 86 M.S.P.B. 318, 321 (2001). Rather, the Board will continue to consider evidence of an employee's duties, "along with all of the other evidence of record, to ascertain whether [an employee] is entitled to LEO retirement coverage." *Ibid.*

In these cases, the Board determined based on all the evidence that petitioners do not meet the statutory definition of an LEO. That determination does not warrant further review in this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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